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Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1499

CHICKYEE MILLAR TSOI, *Petitioner*

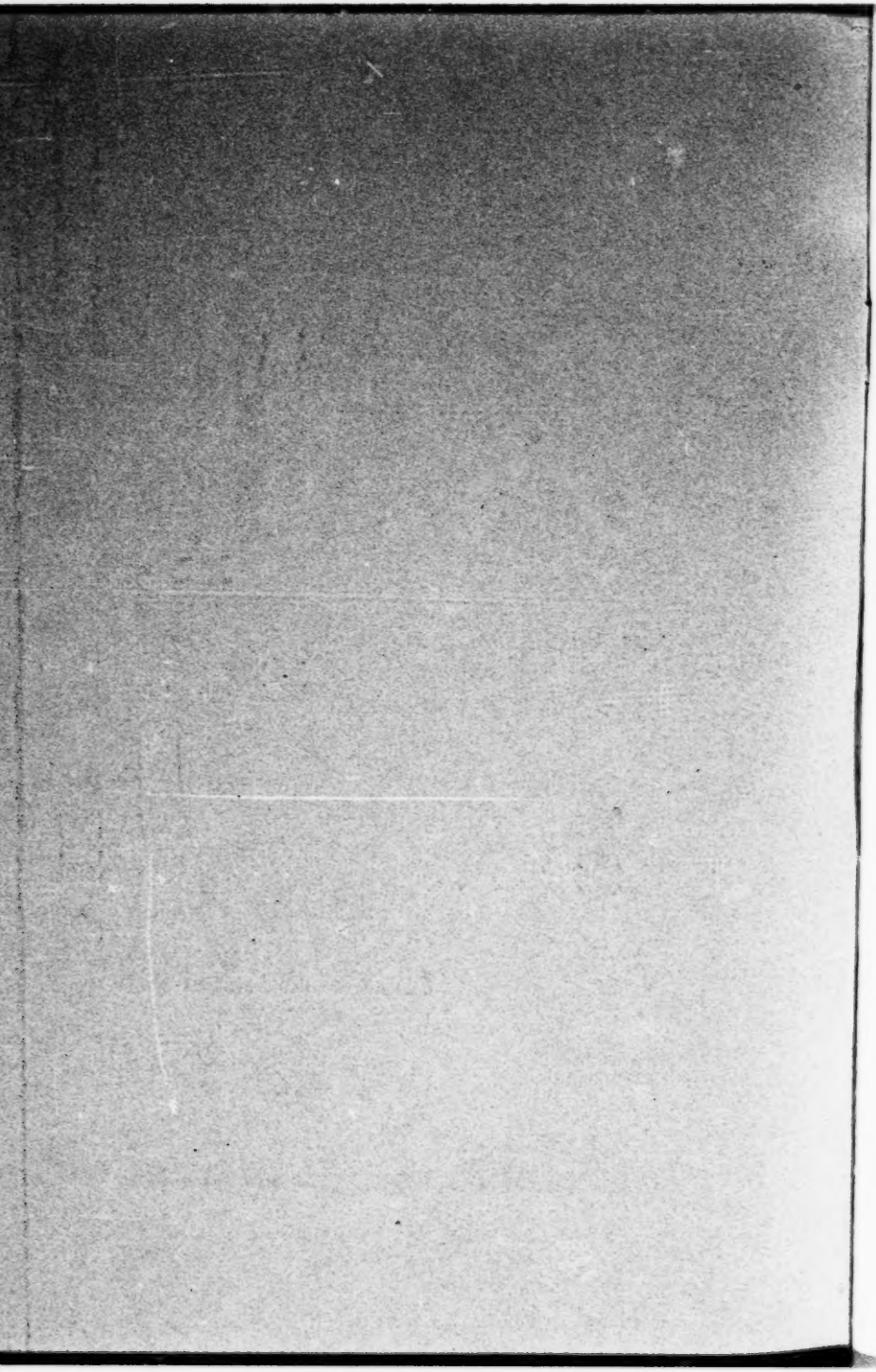
v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

FOREMAN & DEGUERIN
DICK DEGUERIN
Attorneys for Petitioner
512 First National Life Bldg.
Houston, Texas 77002
(713) 224-9321

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002



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CHICKYEE MILLAR TSOI, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Chickyee Millar Tsoi, prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered in this case on the 31st day of January, 1973, denying Petitioner's Second Motion for Rehearing, styled "Chickyee Millar Tsoi vs. The State of Texas", No. 45178.

CITATIONS TO OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reprinted in Appendix A. hereto, infra p. 21, and is reported in 489 S.W.2d 103.

JURISDICTION

The Texas Court of Criminal Appeals affirmed the State District Court conviction on September 25, 1972. Petitioner's Motion for Rehearing was denied December 20, 1972, Judge Truman Roberts dissenting by written opinion. Petitioner's Second Motion for Rehearing was denied January 31, 1973. Jurisdiction of the Supreme Court is invoked under the authority of 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether Petitioner was denied due process and the right of confrontation when the Texas Court of Criminal Appeals held that he had waived his otherwise valid objections to prejudicial evidence by attacking the truth of such evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him, * * *".

The Fourteenth Amendment to the United States Constitution provides in part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law;"

STATEMENT OF FACTS

Prosecutrix, Susan Upchurch, a student at the University of Houston, was raped on January 2, 1970, at approximately 10:15 A.M. (R-81) in her own apartment in Houston. The man who raped her knocked on her door and announced himself to be a maintenance man. As she opened the door a man with a grocery sack over his head stuck a gun in her face, turned her around and closed the door. She got only a fleeting glimpse of his chin and lower part of his face, including the lower part of his dark glases. The rape ensued. She never saw his face or body after the glimpse at the door.

A police investigation was promptly made. Prosecutrix told the investigating officer the rapist was wearing a sack with eye-holes cut in it and that all she could see through the holes were his dark glasses and the skin around his eyes which she described as olive complexion or Latin American, but she apparently did not describe any accent to the officer.

To show a Modus Operandi as a predicate for introducing evidence of extraneous offenses, the State sought to prove that before she was raped prosecutrix had placed an ad for a roommate in the University of Houston student newspaper and that in response to this ad (which contained only her telephone number) she received a call from a person with a heavy accent, the call occurring some two weeks before the rape. She turned the caller down, did not give him her address or apartment number and did not connect the call with the rape until talking to police.

Two line-ups were held at the Houston Police Station on February 9, 1970. Prosecutrix did not positively iden-

tify petitioner at either. Following the line-ups prosecutrix signed an affidavit, introduced as State's Exhibit #2, the pertinent parts of which are as follows:

> "To Officer Eickenhorst—Contacted me by phone and asked me to come to the police station to view a suspect that had been picked up. I came to the station, arrived at 8:20 P.M. and viewed three suspects in a show up. The first thing that I noticed was that the center man's hair was cut in the same way as the man's who raped me. I noticed the fullness of the hair, the way it falls to the side, the lower part of the face. The man was clean shaven at the time of the offense, but he still had a darker beard above the upper lip. The man in the lineup had the same characteristics and was of the same build, height."
>
> At 9:55 P.M. I viewed the showup again to hear the voices of the men. I recognized the voice of the same man as being distinctive, with a clear accent."

Two days later prosecutrix signed another affidavit, introduced as State's Exhibit #1, in which she said:

> "Then, on February 9, 1970, I came to the Police Station where I attended a show-up and I identified the man that raped me. Then tonight, February 11, 1970, I came back to the Homicide Office where I have made this statement."

By the time of trial her identification of petitioner had become positive.

Over strenuous objections, Rosalind Ellis testified that on January 5, 1970 she was beaten by a man who forced his way into her apartment.[1] She identified petitioner as

1. The State did not at first offer this testimony on the issue of identity, nor did the Court accept it on such basis. Rather, it was

the man. The Modis Operandi of this attack was different in all respects from the rape of prosecutrix.[2] Petitioner denied both offenses and offered alibi witnesses.

After Petitioner's conviction, but before submission of his appeal, the Texas Court of Criminal Appeals rendered two significant opinions which would have required reversal of petitioner's case because of the admission of the extraneous offense evidence:

1. *Jones v. State*, 481 S.W.2d 900 (April 19, 1972) curtailed the use of extraneous offenses to show flight;

---

admitted by the Court on the theory that any crime committed by petitioner while in flight was admissible. Nonetheless, the Court later instructed the jury to consider the evidence, if at all, on the issue of identity.

2. The primary offense was Rape, the other was Assault; Susan Upchurch, the complainant in the primary offense, was a student at the U. of H., while Rosalind Ellis, the complainant in the extraneous offense, was not and had not been a student;

Miss Upchurch had advertised for a roommate in the U. of H. student newspaper, Mrs. Ellis had not;

Miss Upchurch lived on Allen Parkway near Shepherd Drive, Mrs. Ellis lived some ten miles away, off the Gulf Freeway;

Miss Upchurch's rapist wore dark glasses, Miss Ellis' assailant did not;

Miss Upchurch's rapist had a grocery sack over his head, while Mrs. Ellis' assailant used a white handkerchief to hide part of his face;

Miss Upchurch's rapist wore a dark jacket; Mrs. Ellis' assailant wore a raincoat;

Miss Upchurch's rapist announced himself as a maintenance man, while Mrs. Ellis' assailant asked to use the phone;

Miss Upchurch's rapist forced the door open immediately while Mrs. Ellis' assailant engaged her in a conversation at the door;

Miss Upchurch's rapist wore gloves, Mrs. Ellis' assailant did not wear gloves; The Upchurch rape took place with little force while Mrs. Ellis was severely beaten, her assailant firing the gun.

2. *Ford v. State*, 485 S.W.2d 727 (June 7, 1972) prohibited the use of *dissimilar* extraneous offenses when the issue was identity;

The thrust of both opinions is that admission of evidence of extraneous offenses in such circumstances denies the accused a fair trial.

However, on appeal, the Court of Criminal Appeals affirmed[3] holding inter alia, that petitioner waived his otherwise valid objections to the extraneous offense evidence by cross-examining the extraneous offense witness and "participating in the presentation of the evidence concerning the extraneous offense".

Petitioner having been sentenced to more than fifteen years, he is prohibited from making bond (Art. 44.04, V.A.C.C.P.) during his appeal.

ARGUMENT

The evidence that petitioner was the man who raped Susan Upchurch was flimsy. Miss Upchurch never saw the rapist's full face (he had a sack over his head) and only got a brief glimpse of his chin and mouth. Although she served as an interpreter at the 1968 Olympic Games in Mexico, she was unable to definitely describe an accent to the investigating officer (petitioner was a foreign

3. Judge Truman Roberts, dissenting, wrote:
"I cannot agree with the majority's disposition of the extraneous offense issue. The subsequent extraneous offense fails to meet the standards of admissibility established by this Court. See *Ford v. State*, 485 S.W.2d 727 (Tex. Crim. App. 1972); and *Newman v. State*, 485 S.W.2d 576 (Tex. Crim. App. 1972). Further, I object to the Court's holding that appellant "waived" his right to complain about admission of this testimony. 489 S.W.2d at p. 106.

exchange student, a citizen of Hong Kong, and speaks with a heavy accent). Two line-ups were held on the same day petitioner was arrested. At the first, Miss Upchurch said that petitioner's hair was cut in a manner similar to her rapist's hair (which she never saw). After the second line-up, during which the three men were asked to talk, she noticed that petitioner had an accent (although both of the other two men in the line-up were of Chinese extraction, neither had accents, both were second and third generation American citizens and 20 to 30 years older than petitioner). Two days after the line-up she signed a statement in which she "identified" petitioner as her assailant. Petitioner offered several witnesses who saw him at home and on the University of Houston campus at the time Miss Upchurch was raped.

It was in this evidentiary context that the State offered the extraneous offense evidence, first justifying the offer on the basis of showing flight, and only later taking the position that the evidence should be considered on the issue of identity. Petitioner objected to the evidence, and obtained a continuous or "running" objection to it, on the grounds that the extraneous offense was dissimilar the primary offense in time, place, substantive offense and modis operandi. The objection was overruled and the extraneous offense witness testified that petitioner physically and violently assaulted her. The jury promptly resolved the uncertainties in the primary offense evidence against petitioner.

The present Texas law on the admissibility of this extraneous offense evidence would clearly and unequivocally require reversal. *Ford v. State*, supra; *Jones v. State*, supra; and *Newman v. State*, 485 S.W.2d 576 (Tex. Crim.

App. 1972). No significant or rational distinction can be drawn between the three cited cases and the instant case, except that petitioner's trial counsel was more thorough in his preparation for trial than counsel in the other cases: he personally interviewed the complainant in the extraneous offense and tape recorded the interview. Yet the Texas Court of Criminal Appeals held that petitioner had waived his objections to the extraneous offense when his counsel utilized the extra preparation during cross-examination of the witness:

> "We need not reach the question of whether Ellis' testimony constituted inadmissible extraneous matters because of the particular manner in which the evidence appears in the record. * * * We have examined the record carefully and conclude that in actively participating in the presentation of the evidence concerning the extraneous offense, the appellant waived his right to complain about the admission of the evidence concerning the same."

The basis for this holding is that petitioner's counsel recorded the interview with the extraneous offense witness, made reference to it while cross-examining her and made it available to the prosecutor to play during the trial. Surely such actions, basic preparation for cross-examination of a hostile witness, cannot be interpreted as meaning "I no longer desire to object to the testimony"; the record is unequivocal in showing petitioner's position throughout the trial as being opposed to the admission of evidence of an extraneous offense. Rather, petitioner's counsel's action in making the tape and using it during cross-examination for impeachment purposes shows only that petitioner was attacking the truth of the extraneous accusation. And in

Texas, prior to the decision of the instant case, the rule had always been that an accused could cross-examine, meet and rebut damaging evidence without waiving his original objection to the admissibility of the evidence.

In *Willoughby v. State*, 219 S.W. 468 (Tex. Cr. App. 1920) the Court of Criminal Appeals said:

> "We know of no decision of this court nor rule of criminal law which compels an accused when evidence has been admitted over his objection to refrain from the right of cross-examination as to such evidence, or else be penalized by the loss of his objection and bills of exception."

Yet in the instant case the Court of Criminal Appeals now says that petitioner *has* lost his objection by cross-examining the witness and presenting impeaching evidence. In this regard petitioner says he has been denied due process and equal protection of the law, for he has been denied the benefit of a well established procedural rule. But additionally petitioner has been denied the right to confront the witnesses against him, for the Court of Criminal Appeals says that he may confront the witnesses only by sacrificing otherwise valid objections to the witness's testimony. The prospective effect of such a rule is to deny a criminal defendant the unfettered right to confront and cross-examine the witnesses against him.

Simply stated, cross-examination of a witness does not waive objections to the admissibility of that witness's direct testimony. If the rule were otherwise it would effectively deny a criminal defendant the right of unrestricted cross-examination and as such would deny him his constitutionally guaranteed right to confront the witnesses against him.

In the early Texas case of *Wade v. State*, 90 S.W. 503 (1905), the complaining witness was allowed to testify, over objection, that the defendant's brother had assaulted him, the complaining witness, in an effort to keep him from testifying against the defendant. The defendant cross-examined the complaining witness on this point. In reversing the case because of the admission of the direct testimony the Court of Criminal Appeals said:

> "The fact that appellant cross-examined him on said matter after it was introduced would not render the testimony admissible".

In *Moore v. State*, 146 S.W. 183 (1912), the Court said:

> "No rule seems to be better established than the one that where testimony had been erroneously admitted, and the defendant is thereby called upon to meet such testimony, the fact that he does introduce evidence to meet it does not cure the error. That ought to be considered as elementary."

In *Brown v. State*, 150 S.W. 436 (1912) the Court said:

> "When the State introduced this evidence (secondary evidence in violation of the best evidence rule) it was a fact in the case as introduced, which defendant was called upon to meet; and the fact that he did meet it as best he could did not cure the original error. However erroneously testimony may be admitted against an accused, it does not cure error for him to meet that testimony with the best evidence attainable; nor does he waive the error on the part of the court in admitting such testimony originally. This is elementary."

In *Reynolds v. State*, 199 S.W. 636 (1917), the Court of Criminal Appeals said:

> "When the State introduced this illegal testimony against appellant, over her objection, the fact that she went on the stand to make an explanation or testify did not cure the error * * *. A party does not waive errors of this sort, where they are committed over his protest, by taking the stand or introducing evidence to lessen the consequences of it as far as may be done. The error of the court was not by this manner waived".

The opinion of the Court of Criminal Appeals in the instant case confuses the above described rule with the equally well established, but quite distinctive, rule of evidence that where a defendant objects to evidence from one source, that objection is waived if the *same evidence* is admitted from another witness without objection or through the defendant himself. The distinction between the two propositions is a logical and rational distinction. In the second proposition, which the Court mistakenly applied to this case, the rule is based upon the principle that the defendant cannot *admit the truth* of the testimony to which he is objecting and thereafter claim injury because of its admission. On the other hand, the rule which should apply to this case is based on the converse of that situation: the defendant does not waive his objection to evidence when he *attacks the truth* of that evidence by presenting contradictory evidence, rebuttal testimony or vigorous cross-examination. In this case petitioner did all three: he vigorously cross-examined Rosalind Ellis and as part of that cross-examination produced an inconsistent prior statement represented by the tape recording; he

offered rebuttal evidence in the form of alibi testimony; and he testified himself denying that he assaulted Rosalind Ellis. If he waived his objection to her testimony by presenting the tape recording, then just as surely he waived his objections by presenting alibi evidence and by denying the assault in person. But of course that is not and should not be the law.

Petitioner's position during submission of his Motion for Rehearing was that he had not waived his objections to the admission of evidence concerning an extraneous offense by vigorously cross-examining the complainant in the extraneous offense case and by making available to the prosecutor a tape recording of an interview of the witness by his trial counsel. His position was and is that he was attacking the truth of the accusations against him and in so doing did not waive his objections to the admission of the evidence.

During submission of the Motion for Rehearing, Presiding Judge Onion suggested that this distinction had been thoroughly discussed in the case of *Patterson v. State*, 458 S.W.2d 658 (1970) and by inference suggested that the distinction was discarded. In fact, just the opposite is true: the *Patterson* case reaffirmed this distinction, citing *Willoughby v. State*, 219 S.W. 468 (1920), likewise cited and quoted in Petitioner's Motion for Rehearing. In the *Patterson* case, Judge Onion said:

> "On original submission this Court noted that on cross-examination before the jury of Stansbury and the prosecutrix's father, the appellant went in to the same conversations complained of and elicited the same facts and enlarged on the surrounding circumstances and cited Ervin v. State, Tex. Cr. App., 367 S.W.2d 680.

> There would appear to be a conflict in cases as to whether an accused may complain of admission of testimony where his own counsel adduces the same testimony upon cross-examination. Cf. Ervin v. State, Tex. Cr. App., 367 S.W.2d 680, with Willoughby v. State, 87 Tex. Cr. R. 40, 219 S.W. 468, where this Court said, 'We know of no decision of this Court nor rule of criminal law which compels an accused when evidence has been admitted over his objection to refrain from the right of cross-examination as to such evidence, or else be penalized by the loss of his objection and bills of exception.'
>
> The Willoughby case seems to represent the correct rule except in cases where the cross-examination extends so far beyond the scope of the direct examination so that it can be said the cross examiner has legitimately made the witness his own witness. Wharton's Criminal Procedure, Vol. 5, Sec. 2044, p. 189; Texas Law of Evidence, McCormick and Ray, Vol. 1, Sec. 27, p. 26; Louette v. State, 152 Fla. 495, 12 So.2d 168; Beachem v. State, 144 Tex. Cr. R. 272, 162 S.W.2d 706. Cf. 5 Tex. Jur. 2d Appeal and Error—Criminal, Sec. 443, pp. 690, 695" Patterson v. State, supra at p. 660, fn. 2.

Thus it is clear that the *Patterson* case reaffirmed the rule announced in *Willoughby,* that an accused may attack the truth of objectionable evidence without waiving his objection thereto.

In the instant case, Petitioner objected to all evidence concerning the extraneous offense and moved to strike the evidence following its admission. During cross-examinaton of the witness it was brought out that the witness had discussed the case with Petitioner's trial counsel and that the discussion had been tape recorded. Petitioner's

trial counsel produced the recording and the prosecutor introduced it and it was played for the jury. But the tape recording purported to be only what the witness told the lawyer. It does not necessarily follow that the conversation on the tape was incriminating, nor does it follow that a conversation between a lawyer and a witness can be equated with "evidence concerning the extraneous offense".

The majority opinion was based upon the assumption that the tape recorded interview can be equated with "evidence concerning the extraneous offense". Such assumption has no support in the record. The only discussion of the tape, and the only characterization of it, inferentially suggests that there are two inconsistencies between the witness' trial testimony and her discussion with Petitioner's trial counsel over (1) the time of the alleged assault upon her; and (2) whether she recognized lawyer Harry Gee, who had been in the lineup with Petitioner, at the beginning or at the end of the taped interview. The first point was important because the question of alibi and therefore time was important. The second point went to her ability to recognize a person as having seen the person before. Neither of these points, nor any other discussion of the tape in the record, can be classified as incriminating as to Petitioner. Thus, the majority opinion affirms this conviction by saying that the content of a tape recording which is not in the record is "evidence concerning the extraneous offense." The Court of Criminal Appeals' opinion therefore has affirmed this case on a matter dehors the record.

The opinion of the Court of Criminal Appeals improperly characterizes the admission into evidence of the tape recording here as the petitioner "actively partici-

pating in the presentation of the evidence concerning the extraneous offense".[4] In truth, however, the tape recording can only be characterized as a prior statement of the witness. According to the questions of petitioner's trial counsel, the prior statement was inconsistent in some respects to Rosalind Ellis's trial testimony; according to the prosecutor some of the tape recording contained statements that were consistent with her trial testimony. It does not matter whether the tape recording was entirely consistent with Ellis' testimony, entirely inconsistent, or partly both. It is a well established rule of law that a statement used to bolster or impeach a witness because of its consistency or inconsistency with the witness' trial testimony, does not enjoy the status of primary evidence and thus is admissible only to discredit or bolster the witness. In 62 Tex.Jur.2d., Witnesses, Section 294, it is said:

> "Generally speaking, a witness whose credibility is attacked may be shown to have made, on another occasion, a statement that is inconsistent with his testimony, for this tends to discredit him. But what the witness said on a previous occasion is admissible only to discredit him; it does not tend and may not be used, to prove the guilt or innocence of the defendant in a criminal case * * *"

This rule has been consistently followed in Texas: *Brown v. State,* 114 S.W. 820 (1908); *Antu v. State,* 147 S.W. 234 (1912); *Doherty v. State,* 208 S.W. 932 (1919); *Dobbs v. State,* 251 S.W. 1057 (1923); *Thomas v. State,* 274 S.W. 577 (1925); *Martin v. State,* 126 S.W.2d 649 (1939); *Carroll v. State,* 158 S.W.2d 532 (1942); *Wells*

4. Although the tape was played during the trial, it is not a part of the record, nor is a transcript of the tape in the record.

v. State, 227 S.W.2d 210 (1950); *Lawhon v. State,* 284 S.W.2d 730 (1956); *Hall v. State,* 297 S.W.2d 685 (1957); *Shivers v. State,* 374 S.W.2d 672 (1964); *Wall v. State,* 417 S.W.2d 59 (1967).

Simply stated, by producing the tape recorded conversation between Rosalind Ellis and petitioner's trial counsel, petitioner did not "actively participate in the presentation of evidence concerning the extraneous offense"; he merely was preventing a prior contradictory statement made by the witness and was thus actively and vigorously cross-examining her and attacking the truth of her accusation. To characterize this as presenting the same evidence as that objected to through another source is a misinterpretation of the record. Furthermore, the Court of Criminal Appeals characterizes this prior inconsistent statement as primary evidence of the extraneous offense; never before has a prior inconsistent (or consistent) statement of a witness been so characterized. The effect of the opinion is to say that by cross-examination of the witness petitioner waived his objections to her testimony; never before has a Texas court so held.

If the record as a whole is examined carefully, it should be abundantly clear that Petitioner never consciously intended to waive his objection to the admission of evidence of the extraneous offense. The majority opinion never speaks to the fact that Petitioner obtained a continuing or "running" bill of exception to the Court's ruling, and at the end of the testimony moved to strike all of the extraneous offense evidence. The opinion is completely silent about Petitioner's trial counsel's efforts to properly present and preserve the objection. The majority opinion says nothing about the fact that the prosecutor offered

the extraneous offense evidence to show flight, yet the jury was instructed to consider the evidence on the issue of identity. In short, the Court of Criminal Appeals has evaded the central issue of this case by wrongfully holding that the objection was waived.

Judge Roberts' dissenting opinion on Appellant's Motion for Rehearing correctly and concisely states Petitioner's position and the controlling law in this case:

> "The subsequent extraneous offense fails to meet the standards of admissibility established by this court. See Ford v. State, 485 S.W.2d 727 (Tex. Crim. App. 1972) and Newman v. State, 485 S.W.2d 576 (Tex. Crim. App. 1972)"

In *Ford v. State,* it was said:

> "We recognize that there will always be similarities in the commission of the same type of crime. That is, any case of robbery by firearms is quite likely to have been committed in much the same way as any other. What must be shown to make the evidence of the extraneous crime admissible is something that sets it apart from its class or type of crime in general and marks it distinctively in the same manner as the principal crime * * *
>
> In the instant case, we find no distinguishing characteristic common to both crimes. There are similarities, but they are more in the nature of the similarities common to the type of crime itself rather than similarities peculiar to both offenses alone." *Ford v. State, supra,* p. 730.

There are no distinguishing similar characteristics between the primary offense and the extraneous offense in

the instant case. The prosecution dwelt at great length on the modus operandi of the person who committed the primary offense, yet the modus operandi of the extraneous offense was completely different and distinct. The extraneous offense did not rebut any issue, alibi, identity, scheme, method or design. In fact, the primary offense was rape, and the extraneous offense was burglary and assault with intent to murder. On this point, it was said in *Newman v. State:*

> "The most obvious distinction between the two offenses is the very offense in question; that is, one involved rape, a sex offense, and the other was a type of theft offense. Therefore, the State's argument that the extraenous offense was admissible in order to prove up identity, motive, scheme or design, fails since any common characteristics between the two offenses are virtually non-existent, except for the fact that both victims happened to be female, which hardly qualifies as a particularly distinguishing characteristic." *Newman v. State,* supra, at p. 578.

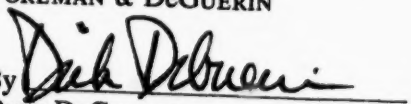
The same is true in the instant case. No justification can be shown or found in the record for the admission of the extraneous offense evidence. This case should be reversed.

CONCLUSION

For the reasons stated the Supreme Court should reverse the conviction and order a new trial.

Respectfully submitted,

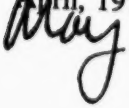
FOREMAN & DEGUERIN

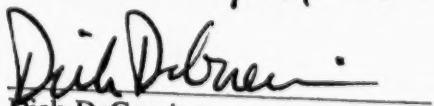
By 

DICK DEGUERIN
Attorneys for Petitioner
512 First National Life Bldg.
Houston, Texas 77002
(713) 224-9321

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Writ of Certiorari have been furnished the Office of the Harris County, Texas District Attorney by placing them in the United States Mail, postage prepaid, certified mail with return receipt requested, this 9th day of April, 1973.





Dick DeGuerin

APPENDIX

CHICKYEE MILLAR TSOI, Appellant,

v.

THE STATE OF TEXAS, Appellee.

No. 45178

Court of Criminal Appeals of Texas.

Sept. 25, 1972.

Rehearing Denied Dec. 20, 1972.

Second Rehearing Denied Jan. 31, 1973.

Defendant was convicted in the 179th District Court, Harris County, Sam W. Davis, J., of rape, and he appealed. The Court of Criminal Appeals, Morrison, J., held that although state elicited initial testimony concerning interview with state's witness who claimed that she had been attacked by defendant three days after attack of prosecutrix, defendant, who brought out fact that interview was tape recorded and who actively participated in presentation of evidence concerning the extraneous offense, waived his right to complain about admission of evidence concerning such offense.

Affirmed.

Roberts, J., filed a dissenting opinion on defendant's motion for rehearing.

Percy Foreman, Richard M. DeGuerin, Houston, for appellant.

Carol S. Vance, Dis. Atty., James C. Brough and Jack Bodiford, Asst. Dist. Attys., Houston, Jim D. Vollers, State's Atty., and Robert A. Huttash, Asst. State's Atty., Austin, for the State.

OPINION

MORRISON, Judge.

The offense is rape; the punishment, twenty (20) years.

[1] Appellant's first two grounds of error challenge the sufficiency of the evidence to support the conviction. The prosecutrix, a 21 year old University of Houston student, who had placed an ad for a roommate in the University newspaper about two weeks earlier and received a phone call concerning it from a man with a heavy accent, testified that, while alone in her apartment on the day in question, she responded to a knock on the door and was confronted by the appellant who was wearing a grocery sack which covered his head and all of his face except the bottom half of his glasses, his nose and his chin. The appellant forced her at gun point to submit to participation in acts of sodomy and an act of intercourse. She testified that she was able to see his entire face for 5 or 10 seconds "between the time I opened the door and he pushed his way in and turned me around." She testified that during the 45 minutes the appellant remained in her apartment, though she was blindfolded, she was able to determine that the appellant was slightly built, had heavy whiskers on his upper lip and hair seemingly cut to the same length all over his head. When she was able to escape from him she made immediate outcry and later positively identified the appellant at the police lineup in which three men of Oriental origin were displayed to her. Appellant's first two grounds of error are overruled.

Appellant's third through seventh and fifteenth grounds of error contend the court erred in admitting evidence

of a subsequent dissimilar extraneous offense which did not show flight, identity or intent. Rosiland Ellis testified over defense objection that the appellant, who she positively identified, forced his way into her apartment on January 5, 1970, and assaulted her at gun point. This assault occurred three days after the attack on the prosecutrix and, though in the same city, was at some distance from her home. We need not reach the question of whether Ellis' testimony constituted inadmissible extraneous matters because af the particular manner in which the evidence appears in the record.

On direct examination, State's witness Ellis testified that she had given statement concerning the attack to the defense attorney. On cross-examination, the defense attorney established that the interview with the witness had been tape recorded.

Then during redirect examination, the following exchange occurred:

> "Q. Well, reckon Lawyer Wilson [appellant's counsel] still has that tape?
> "A. Oh, I am certain he does.
> "Q. And so the tape contains the conversation that you had?
> "A. Yes, it does.
> "MR. WILSON: Your Honor, I hereby tender the tape to counsel for the State for whatever use he cares to make of it.
> "MR. BODIFORD: I am going to offer it to the jury, and I would like defense counsel to produce his tape recorder too.
> "MR. WILSON: I will be glad to, but I don't happen to have it with me. We'll be glad to bring it in tomorrow."

* * *

> "MR. WILSON: Mrs. Ellis can listen to the tape and see if she recalls it. If it is material to any issue in the case, we certainly have no objection to it."

The next day after the tape was apparently produced,[1] the following colloquy occurred:

> "MR. BODIFORD: . . . —I guess the State will just offer the tape into evidence at this time.
>
> "THE COURT: All right, I thought you all had agreed on it yesterday.
>
> "MR. BODIFORD: Yes, sir, I just didn't know whether we wanted it to stay permanently in the record or not. Considering it is Mr. Wilson's tape recorder, that is to be considered also.
>
> "MR. WILSON: Your Honor, as long as he doesn't offer my tape recorder in evidence, I don't mind the tape because it is a permanent tape, it is not an erasable tape. And we are agreeable to having it in evidence in this case and are willing to loan the Court and Mr. Bodiford our tape recorder until the conclusion of the case."

[2] We have examined the record carefully and conclude that in activity participating in the presentation of the evidence concerning the extraneous offense, the appellant waived his right to complain about the admission of the evidence conserning the same. Although the State elicited the initial testimony concerning the interview, it was the defense that brought out the fact that it was tape recorded. No error is presented. 5 Tex. Jur. 2nd, Sec. 446, p. 704.

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1. The tape was later played to the jury.

Appellant's remaining grounds of error relate to the legality of his arrest.

University of Houston police officers, in response to a call, went to the apartment of one Cynthia Louie who reported she had received a telephone call similar to one received by the prosecutrix. While in the area they encountered the appellant. Following a search of his automobile, during which the officers found some paper sacks, they accompanied the appellant, with his consent, to the apartment where he resided. They were admitted to the apartment by a young lady and it was there that, by chance one of the officers found a note near the telephone, which he was using with the young lady's consent, that bore Cynthia Louie's apartment number and address.

[3] Appellant first contends that since the University of Houston officers who arrested the appellant were "off campus" at the time they contacted the appellant that they were, therefore, acting outside their territorial jurisdiction,[2] that the arrest and search of his automobile was unlawful. In Day v. State, 157 Tex. Cr. R. 614, 252 S.W.2d 180, we were dealing with a search by officers who were allegedly outside their territorial and jurisdictional limits. There we said:

> "It should be borne in mind that the fruits of a search are admissible unless the search itself is illegal. It matters not whether the search is conducted by an officer or a mere citizen; if it is effected with the

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2. This encounter with appellant occurred on February 9, 1970, prior to the effective date of the Amendment to Art. 2.12, Sec. 9, Vernon's Ann. C.C.P.

consent of the person in charge of the premises, then it is not illegal."

Cf. United States v. Antonelli, 2 Cir., 434 F.2d 335.

Appellant also contends the officers unlawfully searched his automobile and apartment. The University of Houston police officers testified, in the absence of the jury, that the appellant agreed to a search of his automobile. Nothing found in the course of the search was introduced in evidence. Nothing taken from the person of the appellant was introduced in evidence. The officers did testify that they observed several unused grocery sacks in the trunk of his automobile, but the sacks were not introduced in evidence.

At the conclusion of the hearing, in the absence of the jury, the court found that the officers acted with the consent of the appellant.

We further find that no issue was raised in the evidence concerning the validity of the consent given to the officers and no request that such issue be submitted to the jury was made. The same situation exists concerning the note on the telephone pad. The officers testified that they entered with the consent of the young lady in charge of the apartment. No issue was raised as to this consent being freely given and the court so found.

It would actually be unnecessary for us to determine the legality of the matters appellant raises since he testified fully about his encounter with the officers, the search of his automobile and the officers' visit to his residence. Recently in Batiste v. State, Tex. Cr. App., 464 S.W.2d 149, we said:

> "We need not pass upon the legality of this search because appellant testified and gave his version of the arrest and . . ."

In Young v. State, Tex. Cr. App., 422 S.W.2d 444, we said:

> "We need not pass upon the legality of the search, in view of appellant's admission while testifying in his own behalf that the pistol was under the front seat of his automobile and that the other guns were on the back seat."

In Baity v. State, Tex. Cr. App., 455 S.W.2d 305, we said:

> "We need not decide that question for the appellant, testifying in his own behalf, related on direct examination that he had stated to the officer he had a money box in his possession and that it had come from the Piccadilly Cafeteria. Appellant cannot complain of the improper admission of testimony which he later voluntarily offers himself and expounds upon."

See also Parker v. State, Tex. Cr. App., 384 S.W.2d 712, and Weeks v. State, Tex. Cr. App., 417 S.W.2d 716, Bradley v. State, Tex. Cr. App., 478 S.W.2d 527, Jones v. State, Tex. Cr. App., 484 S.W.2d 745 (1972).

Appellant's remaining grounds of error are overruled.

The judgment is affirmed.

ON APPELLANT'S MOTION FOR REHEARING

Rehearing denied.

ROBERTS, Judge (dissenting).

The majority overrules the appellant's motion for rehearing without written opinion.

I cannot agree with the majority's disposition of the extraneous offense issue. The subsequent extraneous offense fails to meet the standards of admissibility established by this Court. See Ford v. State, 484 S.W.2d 727 (Tex. Cr. App. 1972) and Newman v. State, 485 S.W.2d 576 (Tex. Cr. App. 1972). Further, I object to the Court's holding that appellant "waived" his right to complain about the admission of this testimony. I would grant the appellant's motion for rehearing.

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IN THE

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October Term, 1972

NO. 72-1499

CHICKYEE MILLAR TSOI,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CAROL S. VANCE
District Attorney
Harris County Courthouse
Houston, Texas

JOE S. MOSS
Assistant District Attorney
Harris County Courthouse
Houston, Texas

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548, Capitol Station
Austin, Texas 78711

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OPINION BELOW

Petitioner seeks to review the opinion of the Court of Criminal Appeals of Texas, reported at 489 S.W.2d 103.

JURISDICTION

The decision of the Texas Court of Criminal Appeals was handed down on September 25, 1972. Petitioner's

Motion for Rehearing was denied on December 20, 1972, and his Second Motion for Rehearing was denied on January 31, 1973. While the formal jurisdictional requisites would seem to be satisfied, Respondent disputes Petitioner's contention that rights guaranteed by the United States Constitution were denied to Petitioner.

QUESTION PRESENTED

Whether some constitutional right was abridged where Petitioner was charged with rape and a similar encounter with another woman was introduced into evidence, initially over defense objection, but where later the defense attorney agreed to the introduction of a tape recorded conversation with the second woman wherein the incident of the assault on her was recounted?

STATEMENT OF THE CASE

Petitioner was tried and convicted for the rape of Suzan Upchurch. The victim identified Petitioner as her assailant at the trial, testifying that she had seen his face, heard his voice with its unusual accent, and felt his distinctive hair all of which added up to a recognition of Petitioner as her assailant.

Identification being questioned by the defense, the state offered the testimony of Rosalind Ellis who was unsuccessfully assaulted by Petitioner in a situation similar to the attack on Suzan: a knock on the victim's door, face concealed upon the intended victim's answering the door, a forceable entry into the premises and the use of a pistol to accomplish or attempt to accomplish rape.

Further note is made that Petitioner was captured after

an abortive attempt to make an entry into the apartment of Cynthia Louie. This occurrence also resembled the Suzan Upchurch situation in that, both had advertized for a roommate in a newspaper.

Petitioner's conviction was upheld by the Texas Court of Criminal Appeals and these certiorari proceedings followed.

ARGUMENT AND AUTHORITIES

Petitioner attacks only the introduction of the testimony of Rosalind Ellis in which she described the attack made upon her by Petitioner.

Such evidence is generally admissible under the rule that permits the proof of extraneous crimes to show plan, design, scheme and identification. But whether generally admissible, or not, Petitioner waived any objection to such evidence by agreeing to the introduction of the tape recording of an interview with Rosalind Ellis, made by Petitioner's attorney, in which she recounted the details of her encounter with Petitioner.

However, without regard to an evidentiary rule sanctioning extraneous offense in certain situations and without regard to waiver the issue by Petitioner, the introduction of extraneous crimes does not give rise to a federal constitutional question.

Evidence of other crimes is material to show guilt or innocence. A person who has been shown to have assaulted one woman is more likely to be guilty of the rape of another than a person who has never assaulted a female. It is only an evidentiary rule that prevents the use of similar

acts or crimes—a rule that weighs the probative value of the evidence against the inflamatory aspects of the evidence.

Since the evidence here was material, relevant and probative, no federal question is presented for the fashioning of evidentiary rules is left to the states. *Spencer v. Texas*, 385 U.S. 554 (1967). Any holding to the contrary would constitute "a wholly unjustifiable encroachment . . . upon the constitutional power of states to promulgate their own rules of evidence to try their own state-created crimes in their own state courts . . . " *Spencer v. Texas*, 385 U.S. at page 568.

CONCLUSION

For the reasons advanced above, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

CAROL S. VANCE
District Attorney
Harris County Courthouse
Houston, Texas

JOE S. MOSS
Assistant District Attorney
Harris County Courthouse
Houston, Texas

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548,
Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been deposited in the United States mail, postage prepaid, certified on this the _____ day of October, 1973, to the following address: Mr. Dick DeGuerin, Foreman & DeGuerin, 512 First National Life Bldg., Houston, Texas 77002.

LONNY F. ZWIENER
Assistant Attorney General